



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA74/2012 & JA75/2012

In the matter between:

LINDA PENDORA OOSTHUIZEN

Appellant

and

IMPERIAL LOGISTICS CC

First Respondent

COMMISSIONER BERNARD VAN ECK

Second Respondent

THE NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY

Third Respondent

Heard: 21 November 2013

Delivered: 21 March 2013

Summary: CCMA - Conciliation proceedings - Referral of dispute - Completion of form LRA7.11 and signature by referring party in compliance with rule 4 of CCMA Rules - Form unsigned by referring party – unsigned form defective referral CCMA lacking jurisdiction.

Condonation for the late referral- principles governing condonation application reinstated. Delay excessive and explanation unreasonable - Commissioner dismissing condonation.

Appeal - Practice and procedure- Labour Appeal Court and Labour Court entitled to interfere with commissioner's discretion to grant condonation - Principles applicable - Misdirection - Only misdirection that is of such nature that it shows that commissioner did not exercise discretion or exercised it improperly or unreasonably to be interfered with – Appeal dismissed with costs.

Coram: Waglay JP, Dlodlo AJA and Musi AJA

JUDGMENT

DLODLO AJA

Introduction

[1] In the Court *a quo*, the Appellant sought to have the condonation Ruling made against her by the Second Respondent reviewed and set aside. The Court *a quo* delivered judgment in terms whereof the review application was dismissed. This is an appeal against that judgment. Leave to appeal was granted by the Court *a quo*.

Factual background

[2] On 1 October 2009, the Appellant was before a disciplinary hearing and was found guilty of various charges relating to, *inter alia* gross negligence. The chairperson of the disciplinary hearing recommended that the Appellant be dismissed. The Appellant appealed against the findings of the disciplinary hearing to an internal appeal tribunal. It would appear that the Appellant abandoned her appeal in that on 9 October 2009 she referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation.

- [3] She was assisted by a certain Gerald Nkoana (an employee of Legalwise insurance) in completing the CCMA form 7.11. Neither the Appellant nor Gerald signed the referral form. But in other respects, form 7.11 was properly completed for a claim of alleged unfair dismissal. It, however, transpired that the CCMA lacked jurisdiction to consider the referral in that it ought to have been referred to the Third Respondent. Papers are silent though on how the Appellant and or Legalwise were informed of this development. The Appellant in her founding Affidavit alleged that she was initially under the impression that the referral had been “re-referred” by Legalwise to the Third Respondent but that she was subsequently “informed” that it was “transferred” by the CCMA to the Third Respondent.
- [4] On 10 November 2009, the Third Respondent’s case management officer wrote to Legalwise and informed it that the referral had not been signed as required by the Council’s Dispute Collective Agreement and that it needed to be referred afresh to the Council together with an application for condonation. The Appellant appears to accept that she was indeed advised of this on 10 November 2009 and that she was told by Legalwise that she should consult with an attorney on their panel. She, subsequently, less than a week later did consult with an attorney on the Legalwise panel. This was on 16 November 2009.
- [5] The Appellant’s attorneys advised her that they would first have to obtain “cover” from Legalwise before rendering any assistance to her. The record shows that the cover to take instructions and to complete a referral to the CCMA was granted by Legalwise to the attorneys concerned on 27 November 2007. The attorneys in turn appear to have taken the view that this only constituted cover for the completion of a new referral to Conciliation and thus they would need to obtain additional cover from Legalwise to finance the costs of the condonation application. The attorneys did not perform the referral as an interim step. One gathers no explanation for this from the papers. The papers do not show that these attorneys sought cover from the Appellant herself; nor did they advise her

that her prospects of obtaining condonation could be prejudiced as a result of further delays.

- [6] On 18 March 2010, the attorneys were advised by Legalwise that they had cover and that they could proceed. Fortuitously, the Appellant on that exact date had attended the offices of her attorneys. But notwithstanding the above, the condonation application was only filed on 30 September 2010, a period of more than six months after the cover sought from Legalwise had been granted. The condonation application was accompanied by a signed referral form which appears to have been a copy of the existing form 7.11 to which the Appellant's signature had now been appended.
- [7] The condonation application was opposed by the First Respondent. The First Respondent filed substantive opposing papers setting out why it was of the view that the Appellant should not be granted condonation. On 22 October 2010, the Commissioner found that the Appellant had not provided an acceptable explanation for her delay in referring her dispute. Condonation was accordingly refused.

Discussion

- [8] The first question that comes to mind is whether the first referral was defective. In terms of Rule 4 of the Rules regulating the conduct of proceedings before the CCMA a document may be signed by the party or by a person entitled in terms of the Act or Rules to represent that party in proceedings. Rule 10 provides, *inter alia*, that a party must refer a dispute to the Commission for conciliation by delivering a completed LRA 7.11 (the referral document) and that the referring party must sign the referral document in accordance with Rule 4. Rule 10 further provides that if the referral document is filed out of time, the referring party must attach an application for condonation in accordance with rule 9.
- [9] Also a number of decisions including *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* [1997] 11 BLLR 1475 (LC) dealt with

this issue and found that the failure by the referring party to sign personally or by those authorised to sign the form in terms of the LRA a referral to Conciliation constitutes a material defect depriving the CCMA (or the bargaining council) the jurisdiction to hear the dispute. Clearly the authorised signature on a referral form (being the very first step in submitting to Conciliation) is a jurisdictional fact which must be established before a forum such as the CCMA or the bargaining Council can exercise its jurisdiction over the dispute. I thus fully agree with the Court *a quo* that the first referral (in its original form) was so defective that it could not have formed the basis of lawful jurisdiction without some further act. In the instant matter, the LRA 7.11 form was unsigned.

- [10] . The next question is whether the defective referral was capable of ratification or was it in fact ratified. On behalf of the Appellant it was contended that the latter question stands to be answered in the affirmative. Reliance is wrongly placed on *ABC Telesales v Pasmans* [2001] 4 BLLR 385 (LAC).. In *ABC Telesales*, a candidate attorney in the employ of an employee's attorney of record had signed the referral. The important finding by the Labour Appeal Court in *ABC Telesales supra* is the following:

"However, the referring party's participation in the conciliation process without objection renders the requirement of her signature redundant at that stage. It follows that the rule-maker could not have intended the rule to apply once such participation had occurred and with it, the ratification of the referral".¹

The above authority is clearly distinguishable from the instant case. In the instant case conciliation had not taken place. ,The Appellant applied for the condonation on an unsigned referral form. Of significance is that the Commissioner considered the date on which the Appellant signed her founding Affidavit in the condonation application (20th August 2010) as the date on which he considered the matter properly referred. In the instant matter (unlike in the *ABC Telesales* matter) no tacit acceptance of the referral by the CCMA took place.

¹ At para 6.

- [12] The Third Respondent was within its rights to take the view on whether the requisite jurisdictional facts were present before it. The Appellant having been advised that the referral was defective in that the referral was unsigned only filed a proper referral after a substantial delay. No ratification of the first referral took place. What took place is that the first defective referral was withdrawn and a fresh one lodged. The Court *a quo* expressed the following sentiments that I fully agree with:

“[22]the First Respondent was entitled to object. The effect of this objection was to require the Applicant to file a compliant referral (or at the very least an amended one) together with a condonation application. To hold otherwise would be to allow the Applicant to proceed with a defective referral where one of the prerequisite jurisdictional facts was missing and where the opposing party had refused to give its consent to the non—compliance. In this regard, the law now seems to be settled that the absence of a jurisdictional fact (such as a signed referral form) vitiates the arbitrator’s jurisdiction being a question of objective fact. (See: CUSA v Tao Ying Metal Industries and Others (2008) 29 ILJ 2461 (CC); Wardlaw v Supreme Moulding (Pty) Ltd [2007] 6 BLLR 487 (LAC); Bombardier Transportation (Pty) Ltd v Mtiya NO and Others [2010] 8 BLLR 840 (LAC).”

- [13] The Commissioner found that no proof exists that the original referral to the CCMA was valid. When considering the condonation application before him, the Commissioner was bound to give consideration to the degree of lateness. As pointed out earlier, the Commissioner considered the matter properly referred on 20 August 2010 or on the date of the condonation application (and on the date of signature of the founding Affidavit). According to the Commissioner’s calculation the matter was properly referred 293 days outside the 30 day period prescribed in section 191 of the LRA.
- [14] In determining what constitutes good cause the respective factors of degree of lateness, the prospects of success and the importance of the matter must be considered. See: *Melane v Santam Insurance CO.* 1962 (40 SA 531 (A)). The

above mentioned factors are inter-related and not individually decisive. See: *National Union of Mineworkers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613B-E. The explanation of the delay must cover the entire period thereof, that is, each and every step throughout the process must be covered by the explanation. See: *NUMSA and Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC).

- [15] An unacceptable delay and unsatisfactory explanation will preclude the granting of condonation irrespective of the prospects of success. See: *NUMSA v Council for Mineral Technology* [1993] 3 BLLR (LAC) at 211G-H. The Appellant's explanation of the lengthy delay in the instant matter fell short of the yardstick set out above. It is unconvincing and wanting in material respects. The explanation does not cover each and every step of the period of the delay. I do not find it necessary to document this explanation in this judgment. It is contained in the record and in the judgment appealed against.

- [16] The Appellant set out as grounds of review that the Commissioner failed to properly consider the condonation application. It is particularly averred that the Commissioner failed to have due regard to the explanation given by the Appellant for the delay and that the Commissioner also simply ignored the prospects of success. It is clear that both she and her attorneys were unconcerned with the urgency of this matter and the time limits prescribed by the rules. Upon being told that the application was defective it appears there was absolutely no urgency: they litigated at their leisure.

- [17] A litigant who intends applying for condonation is required to launch such application as soon as she or he or it becomes aware of the necessity to do so. See: *CWIU and Another v Ryan and Others* [2001] 3 BLLR 337 (LC). Dealing with this aspect the Court *a quo* made the following observation:

“Whilst the Applicant has detailed some of her travails during this period, there are glaring gaps and inconsistencies. Put simply, her actions were not those of a concerned litigant who wishes the expeditious resolution of her dispute. In

*particular there is no evidence to suggest that the Applicant was incapable of taking reasonable steps to instruct her attorneys. I am thus of the view that this matter differs markedly from that in Liberty Life Association of Africa Ltd v Hiemstra and Others (2001) 6 BLLR 620 (CC), where the applicant employee took active steps himself to rectify a defective referral.” I agree with this observation and in my view it cannot be faulted. The explanation by the Appellant is so hopelessly wanting that one immediately becomes reminded of the reasoning by Myburg JP in Mziya v Putco [1999] 2 BLLR 103 (LAC) which reads *inter alia*:*

‘There is further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, the application for condonation should be refused.’”

- [18] The Appellant’s attorneys do not appear to have given this matter the attention it deserved. They have their own explanation for this. *inter alia*, the Appellant disappeared; they waited for “cover” etc. The Courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his legal representative. But Courts have emphasised that there is a limit beyond which a litigant cannot escape the result of his representative’s lack of diligence or the insufficiency of the explanation tendered. See, *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) 140H—141D; *Buthelezi and Others v Eclipse Foundries Ltd* (1997) 18 ILJ 633 (A) at 638I—639A.
- [19] The Appellant herein puts the blame on other people including her own insurance, Legalwise. As recently as 2007 this Court held in *Moila v Shai* (2007) 5 BLLR 432 (LAC) that where (in an application for condonation) the delay is excessive and no explanation is given or an explanation that has been given amounts to no explanation at all, it would not be necessary to consider the prospects of success. In my view, the Commissioner had due regard to the evidence placed before him. The Appellant’s version was before the

Commissioner was that she had signed the LRA 7.11 form but that somebody deleted her signature using what she described as correction fluid. However, in the review application, the version she presented was that she in fact did not sign the form known as LRA 7.11. It is important to note that in the review application she presented a version other than the version presented before the Commissioner.

[20] She conceded in the review application that she had in fact not signed the referral form at all. This new version presented for the first time in the review application was obviously not before the Commissioner. This Court in *Moila* case *supra* emphasised that the Court must look at the Affidavits that were legitimately before the forum in order to determine if the Commissioner committed any reviewable irregularity. This Court is thus duty bound to consider the Appellant's version contained in the Affidavit that served before the Commissioner. The Appellant is disingenuous in contending that the Commissioner's decision was irrational regard being had to what was before the Commissioner.

[20] This Court shall not lightly interfere with the exercise of a discretion by the Court *a quo*. The test and guiding principles were set out by this Court in *Coates Brothers Ltd v Shanker and Others* (2003) 24 ILJ 2248 (LAC) as follows:

*"An Appellant must show, in an appeal from a decision of a lower Court, that the Court a quo acted capriciously, or acted on a wrong principle, or in a biased manner, or for insubstantial reason, or committed an irregularity, or exercised its discretion improperly or unfairly."*²

None of the above has been shown by the Appellant in the instant matter.

[21] It follows that there are no merits in this appeal. As far as the question of costs is concerned, I bear in mind that this Court may make such orders regarding costs according to the requirements of the law and fairness. The general rule is that a successful party is entitled to recover its costs. The First Respondent has been

² At para 5.

unnecessarily dragged to Court and was bound to defend itself. The Court is always reluctant to order that employees pay costs to their employers whenever these two become involved in litigation emanating from the employment relationship. However, there is a limit beyond which an order of costs cannot be avoided, this is one such matter

Order

[22] In the result, I make the following order:

- (a) The Appeal is dismissed with costs.

Dlodlo AJA

I agree.

Waglay JP

I agree.

Musi AJA

APPEARANCES:

FOR THE APPELLANT: J C M Roets of Roets & Du Plessis Attorneys

FOR THE FIRST RESPONDENT: Adv Chris Roodt

Instructed by AM Spies Attorneys